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No. _____

In The

Supreme Court of the United States

JAMES R. SABOFF and KATHY R. SABOFF,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If the State denies compensation to a landowner, under state law, are the state court proceedings res judicata to a Fifth Amendment taking claim under § 1983?

2. Must a landowner reserve a Fifth Amendment taking claim for subsequent litigation in federal court if the Fifth Amendment taking claim does not accrue until after exhaustion of state court remedies?

3. If a Fifth Amendment taking claim does not accrue until the landowner has been denied an adequate post-deprivation remedy in the state court, thus creating a separate Fifth Amendment constitutional cause of action, is a formal written reservation under *Fields v. Sarasota Manatee Airport Authority*, 953 F. 2d 1299 (11th Cir. 1992) and *Jennings v. Caddo Parrish School Board*, 531 F. 2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897, 97 S. Ct. 260, 50 L. Ed. 2d 180 (1976), necessary to preserve the right to proceed in federal court after the state court has denied relief under state law.

PARTIES TO THE ACTION

All parties in the courts below are listed in the caption in this Court. Pursuant to Rule 29.1 of this Court, Petitioners have no parent companies nor any non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

James R. Saboff and Kathy R. Saboff hereby petition this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Eleventh Circuit or, alternatively, for a summary reversal of the decision below.

OPINIONS AND ORDERS BELOW

1. The published Opinion of the United States Court of Appeals for the Eleventh Circuit, cited at 200 F. 3d 1356 (11th Cir. 2000) is attached as Appendix A.

2. The unpublished decision of the Fifth District Court of Appeals of the State of Florida, is reproduced as Appendix B.

3. The unpublished denial of Saboff's Petition for Rehearing and Hearing En Banc by the Fifth District Court of Appeals is reproduced as Appendix C.

4. The unpublished decision of the United States District Court, Middle District of Florida, Orlando Division is reproduced as Appendix D.

5. The unpublished denial of Saboff's Petition for Rehearing and En Banc Hearing is reproduced as Appendix F.

STATEMENT OF JURISDICTION

The decision of the Fifth District Court of Appeal of Florida was entered on August 30, 1996. The Saboffs filed

a timely Petition for Rehearing and En Banc review, which was denied by the Fifth District Court of Appeal on October 23, 1996. Petitioner then filed a timely Complaint in the United States District Court, Middle District of Florida, on November 14, 1996, and the District Court entered judgment pursuant to a jury trial on July 28, 1998. The Water Management District filed its appeal with the Eleventh Circuit Court of Appeals on August 25, 1998, which reversed the decision of the District Court by Order dated January 18, 2000. Petitioners' Motion for Rehearing and Rehearing En Banc was denied on March 20, 2000, and this Petition for Writ of Certiorari has been timely filed in accordance with Rule 13 of the United States Supreme Court Rules. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments of the United States Constitution. The Fifth Amendment provides, in part, "[N]or shall private property be taken for public use, without just compensation." *United States Constitution, Amendment V.* The Fourteenth Amendment provides, in part, "[N]or shall any state deprive any person of life, liberty, or property without due process of law." *United States Constitution, Amendment XIV.*

STATEMENT OF THE CASE

Petitioners, James R. and Kathy R. Saboff ("Saboffs"), purchased an unimproved residential lot in The Springs Landing subdivision consisting of approximately .7 acres and fronting upon the Little Wekiva River.[1] In 1991, after the homeowners association and Seminole County approved the Saboffs' proposed plans for the construction of their home, the Saboffs, for the first time, were advised that in 1989, five (5) years after they had purchased the property, the St. Johns River Water Management District ("Water Management District") had enacted a Riparian Habitat Protection Zone Rule ("RHPZ"), which, in essence, placed the Saboffs' entire lot into the Habitat Protection Zone and restricted the total use of the lot. The Saboffs then approached the Water Management District's Governing Board seeking a waiver to the RHPZ. On June 11, 1991, the Board granted the Saboffs a permit to construct their home subject to the condition that the Saboffs dedicate a conservation easement which would encompass four-tenths (.4) of an acre, over one-half (1/2), of their riverfront property.

The Saboffs brought an action in the Circuit Court for the Eighteenth Judicial Circuit in Seminole County, Florida alleging, among other things, a violation of their federal substantive due process rights and equal protection afforded to them by the United States Constitution, and seeking a mandatory injunction pursuant to 42 U.S.C.

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[1] Contrary to the Eleventh Circuit Court of Appeals' Factual Background, the subdivision restrictions prohibiting building on only a fraction or less than .05 acres, which was designated below the hundred year flood plain.

§ 1983, to allow the Saboffs to construct their residence. In the same timeframe, an administrative proceeding was commenced by third parties to challenge the Water Management District decision allowing the Saboffs to clear the lot.

The Water Management District removed the state court action to the United States Middle District Court of Florida, where it filed a Motion to Dismiss based upon the issue of "ripeness." As a result of negotiations, the parties to the pending federal litigation and administrative proceedings stipulated to allow the Saboffs to construct a home and pool on three-tenths (.3) of an acre of their property. The parties entered into a Partial Settlement Agreement, dated January 1992, (Appendix E) wherein the Saboffs dismissed the injunctive relief, deleted all federal claims, and remanded the action back to the state court. It was specifically agreed that the settlement was in no way a "consent to or waiver of defenses to any matters complained in any proceedings." (Appendix E)

The state court action was reconvened and the Saboffs filed their Amended Complaint, which sought declaratory relief, procedural and substantive due process violations, as well as inverse condemnation, *pursuant to Florida law and the Florida Constitution*. The state court, in a series of orders, dismissed the Saboffs' Second Amended Complaint and the Saboffs thereafter filed a Third Amended Complaint seeking declaratory relief, together with an action for inverse condemnation, substantive due process and invasion of privacy, all *pursuant to Florida law and the Florida Constitution*.

On May 11, 1995, the state circuit court dismissed Saboffs' Third Amended Complaint, with prejudice, specifically ruling, as a basis for dismissal, that a landowner could not state a claim for inverse condemnation by regulation if they did not allege a deprivation of substantially all reasonable economical use of the property. The Saboffs then appealed to the Fifth District Court of Appeal and, on August 30, 1996, fifteen (15) months later, the Fifth District Court of Appeal affirmed the lower court's dismissal, citing Florida Constitution, Article II, Section 7: § 369.311, Florida Statutes, and *Department of Community Affairs v. Moormon*, 664 So. 2d 930, 932-933 (Fla. 1995). The Saboffs' Motion for Rehearing and En Banc proceedings was denied by the Fifth District Court of Appeals on October 23, 1996. (Appendix C). Two (2) weeks later, the Saboffs filed a federal court action pursuant to 42 U.S.C. § 1983 for violation of their federal constitutional and Fifth Amendment rights by virtue of denial of just compensation for a regulatory taking of their property.

The Saboffs' § 1983 action had now accrued as a result of the state court's denial of just compensation, and the Saboffs alleged the constitutional tort for denial of just compensation, pursuant to the Fifth Amendment to the United States Constitution, and deprivation of equal protection and substantive due process under the Fourteenth Amendment to the United States Constitution.

After motion practice in federal court, a jury trial was conducted in May of 1998, where the parties agreed to submit evidence on all issues, reserving the inverse condemnation ruling for the judge, and damages and other issues to the jury. The trial court judge determined that

the imposition of the RHPZ conservation easement over four-tenths (.4) of the Saboffs' lot amounted to a right or interest in real property being taken and limited the Saboffs' right to exclude others from their property, thus constituting inverse condemnation of the Saboff property. Evidence was produced that substantiated the Saboffs' claim that the Water Management District's rule, as applied, violated Saboffs' substantive due process rights and denied them equal protection. Appraisers for both sides agreed that the imposition of the RHPZ over the Saboffs' property had a significant impact on the value. The jury determined that the "as applied" rule resulted in a substantive due process and equal protection violation of the Saboffs and awarded damages for inverse condemnation and substantive due process violations.

The Water Management District appealed the District Court's decision and, after oral argument, the Eleventh Circuit of Appeals reversed the judgment, holding that *Jennings v. Caddo Parrish School Board*, 531 F.2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897, 97 S. Ct. 260, 50 L. Ed. 2d 180 (1976), and *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), dictate that the Saboffs' federal claims are barred by Florida law of res judicata. The Eleventh Circuit's holding ignores the ruling of this Court in *Del Monte Dunes v. City of Monterey*, 119 S. Ct. 1624 (1999), and the fact that the state court action and the state court's dismissal of the Saboffs' takings claims were based solely on state law and did not address federal constitutional claims, which did not arise until the denial of compensation under state law.

REASONS FOR GRANTING THE WRIT

At issue is whether a § 1983 tort action founded upon violation of the Fifth Amendment of the United States Constitution is a separate independent cause of action than that which is brought, or can be brought, in state court pursuant to state law seeking just compensation. This Court, in *Del Monte Dunes*, held that "there is no constitutional or tortious injury until the landowner is denied just compensation," and further that "a federal court, moreover, cannot entertain a taking claim under § 1983 unless, or until, the complaining landowner has been denied an adequate post deprivation and remedy." To allow the Eleventh Circuit Court of Appeals decision in this cause to stand will effectively foreclose a property owner's right to a federal taking claim.

I. If a Plaintiff pursues a state law regulatory taking claim in state court and is denied just compensation on the grounds that state law does not recognize a partial regulatory taking, does an effective § 1983 federal taking claim remain?

The question is whether a regulatory taking claim, brought pursuant to § 1983 and sounding in tort, is an identical cause of action to that brought in the state court pursuant to the State Constitution. If a separate cause of action, the doctrine of res judicata does not apply to subsequent federal court actions and the decision below must be reversed. The Eleventh Circuit Court ruled that the Saboffs' federal taking claim, brought pursuant to 42 U.S.C. § 1983, was barred by the doctrine of res judicata because their prior inverse condemnation suit in state

court, which had been *dismissed for failure to state a cause of action*, was an identical action, and the Saboffs had failed to make a formal reservation of their federal claim in state court pursuant to *Jennings v. Caddo Parrish School Board*, 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976). The Saboffs had argued that the Partial Settlement Agreement reserved further federal actions and the Water Management District consented to subsequent federal actions as a result of the remand to state court and the subsequent administrative hearing, where the Saboffs stated on the record that they would bring an action based on the constitutionality of the actions of the Water Management District. Under *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), the Water Management District implicitly consented, or by tacit agreement, recognized the Saboffs' reservation of their subsequent federal court action. But, in any event, the doctrine of res judicata could not apply because a state taking claim was not identical to a § 1983 federal regulatory claim.

In its decision, the Eleventh Circuit panel did not reach the merits of Saboffs' partial regulatory taking claim, but reversed the judgment on the rationale that (a) under *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), "the doctrine of res judicata in conjunction with 28 U.S.C. § 1738 precludes the plaintiff from pursuing in federal court a *claim previously litigated* in state court," unless the plaintiff reserves the federal claim by formal reservation on the state court record pursuant to *Jennings*; (b) the Court in *Fields* found that Florida law treats claims as "identical" for res judicata purposes where the causes of action "share similarity of facts essential to both actions"; (c) in this case, "the facts

underlying the state and federal claims at issue are indisputably identical," and, thus, "it is clear that Florida res judicata principles would normally preclude the subsequent federal action"; and (d) because the exception to res judicata under *Jennings* requires that a reservation of the federal claim "must be set forth clearly, on the record, and at the outset of the state court claim, which was not done in this case," the Saboffs' off-the-record understanding with the District "is clearly insufficient to meet the standard for a *Jennings* reservation." The panel thus concluded that "*Jennings* and *Fields* dictate the Saboffs' federal law claims are barred by Florida law of res judicata." (See Appendix A).

The circuit court's decision ignores this Court's holdings in, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), as well as established Florida law. There can be no Fifth Amendment violation until the state court has denied just compensation. Indeed, the state courts denied compensation expressly stating, "plaintiffs cannot otherwise state a claim for inverse condemnation by regulation because they cannot allege that they have been deprived of substantially all reasonable economical use of the property," citing Florida law, *Fox v. Treasure Coastal Regional Planning Council*, 442 So. 2d 221 (Fla. 1st DCA 1983). The Fifth District Court of Appeal concurred and filed a Per Curiam Opinion again citing Florida law. *Department of Community Affairs v. Moormon*, 664 So. 2d 930, 932-933 (Fla. 1995); Florida Constitution, Article II, Section 7; § 369.311, Florida Statutes (1995). The Saboffs' state court claims were dismissed at the pleading stage. It is clear that the Florida courts held there could be no

partial regulatory taking under Florida law, despite the recognition of such claims under federal law.

The *Fields* Court found that entry of summary judgment against a landowner was proper "only if (1) Florida preclusion law would bar the filing of a state court suit raising the federal taking claims," *See*, 28 U.S.C. § 1738; and (2) the homeowners failed to make a *Jennings* reservation. This is interesting since the court had questioned the wisdom of *Jennings* and the Court's reluctance "to override *Jennings*." (*Id.* 1305).

It is well established in Florida that the doctrine of res judicata does not bar a cause of action merely because the action arose from the same factual situation. *Seaboard Coastline Railroad Company v. Industrial Contracting Company*, 260 So. 2d 860 (Fla. 4th DCA 1972). Res judicata applies only when the four identities are present (1) identity of the things sued for; (2) identity of the cause of action; (3) identity of the persons and parties; and (4) identity of the quality or capacity of persons for or against whom the claim was made. *Cole v. First Development Corporation of America*, 339 So. 2d 1130 (Fla. 2nd DCA 1976); *Matthews v. Matthews*, 133 So. 2d 91 (Fla. 2nd DCA 1961).

Res judicata does not apply in this case for two reasons. There is no identity of the cause of action nor an identity of the thing sued for. "A fair way of determining the nature of a cause of action is to examine the main prayer of plaintiff's complaint." *Daniel v. Department of Transportation*, 259 So. 2d 771 (Fla. 1st DCA 1972). It is undisputed that Saboffs' state action claim sought different remedies from that allowed under § 1983. Moreover,

"For there to be 'identity of cause of action,' within the meaning of the doctrine, the degree of proof required in the second suit must be at least as great as that required to support recovery in the first suit. If the degree of proof required in the first suit is greater than that required in the second, the cause of action cannot be held to be the same." *Matthews v. Matthews*, 133 So. 2d 91 (Fla. 2nd DCA 1961).

The state court would not allow the Saboffs to plead a partial regulatory taking, much less present evidence and proof of the same. Federal law recognizes a partial regulatory taking and, at the federal district court trial, the jury awarded compensation based on the evidence supporting the cause of action for a regulatory taking, "thus, the defense of res judicata must fail in the instant cause because of the difference in the degree of proof required by Florida and federal courts." 133 So. 2d at 95.

The Eleventh Circuit focused upon the identity of the facts essential to the maintenance of the suits rather than distinguishing between the state cause of action based on state eminent domain principles and a § 1983 federal constitutional tort action arising after denial of just compensation for improper regulatory taking. Florida courts have recognized the problem of applying res judicata when two (2) theories arise out of a similar set of facts. The Fourth District Court of Appeal noted in *Seaboard Coastline Railroad v. Industrial Contracting*, 260 So. 2d 860 (4th DCA 1972):

> "The problem in applying res judicata arises in connection with the 'identity of the things sued for' and 'identity of the cause of action.' "

> Even though both actions arose out of the same set of facts, there is not, in our opinion, the necessary element present to satisfy the aforementioned conditions. The essence of the 'things sued for' is essentially different although having arisen from the same factual situation."

The *Fields* Court noted the precise question before it was whether the presence of an additional element for establishing a compensable taking (an absolute decrease in value) is significant to shield the homeowner's federal claim from the application of Florida's law merger and bar rules. 953 F.2d at 1308. The *Fields* Court then recognized that the question of res judicata was a "close one," concluding that the federal taking claims were essentially the same as raised in the Florida law inverse condemnation action. The state court in *Saboff* refused to recognize any claim for partial regulatory taking. State and federal law impose different rights and duties and, particularly where the federal claim is based upon a constitutional tort action.

> "the principle test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case." *Dilbon v. Women's Specialty Retailing Group*, 674 So. 2d 799 (1996).

The Eleventh Circuit's focus upon the identity of the parties and the quality or capacity of the parties to whom the claim was made overlooks the significant body of federal law on partial regulatory takings developed in the wake of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Federal courts have generally recognized two species of "regulatory taking." First, where a party is denied all economically viable use of their property,

which is a "categorical" taking under *Lucas*; and second, a partial deprivation resulting from the imposition of a regulatory restraint, i.e., where a regulation deprives the owner of a substantial part, but not necessarily all of the economical use or value of the property. Both species were addressed by Justice Scalia in his opinion in *Lucas* at Footnote 7, as stated in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994):

> Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests. In *Lucas*, the Supreme Court touched upon the question of a partial regulatory taking, see 112 S. Ct. 2893-95, but, concluding on the facts before it that the case was one in which the owner was called upon "to sacrifice all economical beneficial uses in the name of the common good," *Id.* at ___, 112 S. Ct. at 2895, the Court found a categorical taking and thus did not have to decide the partial taking question. *Id.* at ___, n. 9, 112 S. Ct. at 2896 n. 9.
>
> Justice Stevens, writing separately, criticized as arbitrary the notion that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Id.* at ___, 112 S. Ct. at 2919, Stevens, *dissenting*. In response, Justice Scalia, writing for the Court, noted that Justice Stevens' analysis "**errs in its assumption that the landowner**

> **whose deprivation is one step short of complete is not entitled to compensation.**" *Id.* at ___, 112 S. Ct. at 2894, n. 8.

18 F.3d at 1568-69.

And, further explained:

> Finally, the dissent believes that Supreme Court precedent establishes that a Fifth Amendment claim that specific property has been taken is an all or nothing proposition. If taken to mean that a regulatory taking cannot result in less than a taking of the property owner's entire fee estate, we cannot agree. ***There has never been any question but that the government can take any kind of recognized estate or interest in property it chooses in an eminent domain proceeding; it is not limited to fee interests. We see no reason or support for a different rule in inverse condemnation cases, and that is true whether the taking results from a physical or regulatory action.***

Id. at 1572. (emphasis added). *See*, also *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179-80 (Fed. Cir. 1994).

The conservation requirements imposed on the Saboffs by the District are the type of regulations that constitute a taking, in that there is no reasonable relationship, or "nexus" between the permanent condition of the Saboffs' property and the use to which the property is being made. Indeed, the evidence supports the fact that the mitigation requirements are "merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1994), *quoting* from, *Simpson v. North Platte*, 206 Neb.

240, 245, 292 N.W. 2d 297, 301 (1980). The facts of the Saboffs' case fall precisely within *Dolan*; there has been an "arbitrary and capricious substantive due process" taking. *See, Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir. 1991); *Nollan v. California Coastal Commission*, 483 U.S. 825, 197 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). In sum, even though a deprivation of *all* use is not shown, a regulatory taking may be found based on consideration of other factors.

II. To require a formal *Jennings* reservation in state court to preserve a § 1983 Fifth Amendment action creates a trap for the unwary and ignores the constitutional right of a property owner to utilize procedure for obtaining damages and compensation under the Fifth Amendment. A reservation, whether it be formal, tacit, or by consent is unnecessary in the context of § 1983 in the federal land use action.

The Eleventh Circuit's reliance upon the doctrine of res judicata and an express reservation pursuant to *Jennings* and *Fields* is ironic given the *Fields* Court's consternation about *Jennings*, which parallel some concerns held by the *Dodd* Court. The *Fields* opinion, at footnotes 5 through 10, evidenced the Court's concern for potential unfair application of the res judicata rules and notes that in each case considered, *the state court had fully addressed federal takings claims, or that the federal takings claims were not at issue in the state court action*. The Court's acknowledgement that counsel for the homeowners in *Fields* "believed Florida state taking law was identical to federal taking law" is instructive. The Court further declined "to

weaken res judicata and collateral estoppel rules to accommodate state court parties who are taken unaware by changes in state law announced for the first time incident to their case." Such is not the case before this Court.

The Saboffs were made aware of the need to pursue state court remedies before resorting to federal court by the Water Management District itself when the District filed its Motion to Dismiss based on ripeness. The Saboffs were forced to delete their federal claims and forced back to the state court. As part of the remand negotiations, the parties entered into a Partial Settlement Agreement (Appendix E), where it was specifically recognized that remand was to cure any ripeness issues. The Eleventh Circuit apparently overlooked the fact that the Saboffs were forced to pursue state court proceedings, notwithstanding that the *Fields* Court noted that the operation of *Williamson County*, much like the abstention doctrine at issue in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461 (U.S.La. 1964), "forces would be federal court litigants to litigate their claims in state court." 473 U.S. 172 at 304. The Court further stated:

> "Therefore, for purposes of applying *Migra*, we hold that would be federal court litigants, who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law, incident to a taking clause claim, are 'involuntarily' in the state courts and, therefore, qualify for the exception to the generally applicable res judicata principles." *Id.* at 1306.

The application of the *Jennings* reservation to a Fifth Amendment taking claim is inappropriate as is the

suggestion that a § 1983 action can be brought simultaneously with a state court action. It seems clear that § 1983 Fifth Amendment claims cannot be brought simultaneously with a state court action. As *Dodd* notes:

> Once the appropriate state agency reaches a final decision, the second ripeness requirement of *Williamson County*, the compensation element, is triggered. A federal court lacks jurisdiction to consider an as-applied regulatory taking claim until a determination is reached that "just compensation" has been denied by the state; because the Fifth Amendment prescribes taking without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right, therefore, requires that a property owner utilize proceedings for obtaining compensation before bringing a § 1983 action.

Dodd at 859.

The *Dodd* Court concluded that "under the teachings of *Williamson County* and decisions of this Court in the context and ripeness, the compensation element is satisfied if remedies available under state law have been pursued." *Id.* at 860

> [T]o hold that a taking Plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every taking claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.

Dodd at 860-61 (emphasis added).

Likewise producing a draconian result is the requirement for a formal reservation to pursue a cause of action that has not accrued. Assuming that the government is not aware of recent Supreme Court cases announcing that a § 1983 Fifth Amendment claim cannot be brought until state court remedies have been exhausted, what "notice" or type reservation must be given to unwary government counsel? There is no mandated form nor statutory law that sets forth a specific way to reserve a claim that should or may be made for subsequent federal court action. The *Dodd* Court recognized this concern and found:

> First, *consent or tacit agreement* is clear justification for splitting a claim. *Restatement Second of Judgments, 26(1)(a), and comments a (1982).* Because a primary purpose of claim preclusion is to protect defendants from being harassed by repetitive actions based on the same claim, the rule need not be enforced where the State and County have implicitly consented to the splitting of the *Dodd* claim under state and federal laws.

Dodd at 862 (emphasis added).

The Water Management District surely cannot claim harassment by a repetitive action, because the merits of the Saboffs' federal claims have never been addressed. At every proceeding, in the initial state court action, removal to the federal court, then an administrative process, and again in the state court, the Water Management District acknowledged the potential for outstanding federal claims when it filed the Motion to Dismiss based on ripeness, which resulted in the remand. Such conduct

was surely a tacit agreement to face further federal claims or, at a minimum, consent to further federal action. There has never been a "full and fair adjudication" in state court of the Saboffs' constitutional claims to which federal due process guarantees them. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 482 (1982).

The Saboffs were anything but silent in reserving their constitutional challenge. The administrative hearing officer's interim order incorporated by reference the Partial Settlement Agreement, where the Water Management District gave implied consent to proceed on federal claims at a later date. The *Dodd* Court also stated that a court may reserve a part of the plaintiff's claim for subsequent litigation by "expressly omitting any decision with regard to it in the first judgment," *Dodd* at 862. Specifically, the Court stated:

> It may appear in the course of an action that the plaintiff is splitting a claim but there are special reasons that justify him doing so, and accordingly that the judgment in the action ought not to have the usual consequences of extinguishing the entire claim; rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the first action.

Dodd at 862.

The Saboffs and the Water Management District negotiated the Partial Settlement Agreement with the negotiations clearly involving the possibility of further action on federal claims as evidenced by the entire remand process. After the state court claims had been remanded, the Water Management District again

acknowledged that the Saboffs were reserving the right to challenge any statutory or constitutional violation at the administration hearing. The Partial Settlement Agreement anticipated more than the remanded state court action, the parties agreeing at pertinent Paragraphs 6, 7, and 8 as follows:

> 6. Saboff agrees he will dismiss, with prejudice, Count V of the Complaint which Saboff filed in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, bearing Case Number: 91-2970-CA-16-L, now pending as *Saboff and Saboff v. St. Johns River Water Management District, Patrick Frost, Florida Audubon Society, Charles Lee, Friends of the Wekeiva and Nancy Prime*, in the United States District before the Middle District of Florida, Orlando Division, Case Number: 91-907-CIV-ORL-18.
>
> 7. This partial settlement agreement is not and shall not be interpreted in any way to be a consent or a waiver of defenses to any matters complained of in any proceedings by Saboff. Furthermore, by this agreement, Saboff does not concede to DOAH's jurisdiction over this matter.
>
> 8. This Partial Settlement Agreement concerns disputed claims and defenses. By stipulating to this agreement, none of the parties admits any facts or conclusions of law, except as otherwise stipulated herein.

After the Partial Settlement Agreement, the remand to state court, and the administrative hearing, the Water Management District continued to steadfastly argue in

state court that the failure to allege a taking of all property was a bar to compensation under state law. Clearly, a tacit understanding and acknowledgement of potential federal litigation.

By executing the Partial Settlement Agreement and remanding the claims back to the state court for determination of state issues only, the Water Management District specifically acknowledged "no consent or waiver of defenses complained of in any proceedings by the Saboffs". Moreover, it is undisputed that, at the administrative hearing, which took place ***after*** the Water Management District had raised the issue of ripeness and partial taking in federal court, the Saboffs specifically advised the hearing officer that they were going to bring an action based, not on the conservation easement itself, but on the constitutionality of the actions of the District. The District impliedly if not expressly consented to the claims splitting.

The *Dodd* decision can be viewed as nothing more than an attempt to interject common sense and logic into the federal judicial system. Indeed, while not directly addressing an *England* reservation, the *Dodd* Court advanced the same concerns as Justice Douglas in his concurring opinion in *England*. Justice Douglas was absolutely correct when he stated the *England* case makes the *Pullman* case somewhat of a "Frankenstein" and creates a "trap for the unwary." The *Dodd* Court alluded to this trap with its statement that the requirement that one must go through the state court proceedings, subjecting themselves to a myriad of judges, judicial assistants, justices, and otherwise, who are not familiar with the "taking" issues, as a condition precedent to bringing a Fifth

Amendment claim in federal court, is wrong in that it denies a federal forum to every taking claimant.

The genesis of the reservation doctrine announced in *England, Jennings,* and *Fields* is the res judicata doctrine. Thus the reservation doctrine likewise should be governed by the well-settled principles of res judicata as established by the Florida Supreme Court.

> "[W]e note the Florida Supreme Court's holding that 'the [res judicata] doctrine will not be invoked where it will work an injustice . . . " *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97 (Fla. 1973) (footnoted omitted); *See also, Universal Construction Company v. City of Ft. Lauderdale,* 68 So. 2d 366, 369 (Fla. 1953) ("Indeed, this very Court, among others, has announced the salutary principle that the doctrine of res judicata should not be so rigidly applied as to defeat the ends of justice."); *Wallace v. Luxmoore,* 156 Fla. 725, 24 So. 2d 302, 304 (1946) ("Stare decisis and res judicata are perfectly sound doctrines approved by this Court, but they are governed by well-settled principles and when factual situations arise that to apply them would defeat justice, we will apply a different rule."); *Flesche v. Interstate Warehouse,* 411 So. 2d 919, 924 (Fla. 1st DCA 1982)."

CONCLUSION

The Saboffs exemplify the many property owners caught in a decade of land use law that has been in a constant state of confusion as courts consider various theories, rights, and duties applicable to each party.

Before the merits of a property owner's claim can be addressed, a landscape of one mine field after another must be crossed. People who spend their lives working in the land use arena and "struggling to wrestle coherence from the substantive and procedural goulash prepared by a judicial system, sometimes lose sight of the fact that the ultimate issue is protection of the individual. That is what the Bill of Rights is all about."

The *Dodd* Court recognized the potential unfairness of preclusion law as it applies to a § 1983 Fifth Amendment taking, as did the *Fields* Court. The *Saboff* Court's insistence that a reservation must be made on the record at the outset of the state court suit produces a manifest injustice which merely elevates form over substance, which caused both the *Dodd* Court and the *Fields* Court great concern.

The Saboffs did not go to federal court for a second bite. The Saboffs' state claims were dismissed on the ground that Florida law did no allow compensation for a partial regulatory taking. The doctrine of res judicata does not apply and the Water Management District's motion, based on ripeness and the subsequent Partial Settlement Agreement, amounted to a consent or tacit agreement that further potential federal claims may exist, and, thus, alleviates a formal reservation of a § 1983 action.

Dated this 14th day of June, 2000.

Respectfully submitted,

LEFFLER & ASSOCIATES, P.A.
MICHAEL D. JONES, ESQUIRE
Florida Bar Number: 0137608
Atrium II Building
301 West State Road 434, Suite 317
Winter Springs, Florida 32708
(407) 327-7275
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APPENDIX "A"

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-3337

D.C. Docket No. 96-1223-CIV-ORL-18

JAMES R. SABOFF,
KATHY R. SABOFF,

Plaintiffs-Appellees,

versus

ST. JOHN'S RIVER WATER
MANAGEMENT DISTRICT,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(January 18, 2000)

Before DUBINA, Circuit Judge, KRAVITCH, Senior Circuit Judge, and NESBITT*, Senior District Judge.

NESBITT, Senior District Judge:

The Defendant St. John's River Water Management District appeals from the district court's denial of its motion for summary judgment on res judicata grounds. For the reasons set forth below, we reverse.

---

*Honorable Lenore C. Nesbitt, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

I. Procedural Background

In 1991, Plaintiff/Appellees James and Kathy Saboff ("the Saboffs"), landowners in a Seminole County, Florida subdivision, filed suit against Defendant/Appellant St. John's River Water Management District ("the District") in Florida state court for inverse condemnation, procedural and substantive due process violations, and declaratory relief, under the Florida Constitution, as well as for federal substantive due process and equal protection violations. The District removed the case to federal court on the basis of federal question jurisdiction. After the District moved to dismiss the Saboffs' federal substantive due process and equal protection claims as unripe, the Saboffs voluntarily dismissed the federal claims. Subsequent to remand, the state circuit court dismissed the Saboffs' claims for failure to state a cause of action. On appeal to Florida's Fifth District Court of Appeals, that court's decision was affirmed. The Saboffs' request for a rehearing *en banc* was denied on October 23, 1996.

On November 14, 1996, the Saboffs filed a complaint alleging federal substantive due process and federal equal protection claims, along with a federal takings claim, in the District Court for the Middle District of Florida. The district court summarily denied by "endorsed order" the District's motion for summary judgment. The district court found a taking and sent the determination of the value of the taking, along with the substantive due process and equal protection claims, to the jury. The jury returned a verdict in favor of the Saboffs on each of the claims, awarded $100,100.00 for the

taking and $14,000 for the substantive due process violation, but found no monetary damages for the equal protection violation. The district court denied the District's post-trial motion for judgment as a matter of law.

II. Factual background

In 1984, the Saboffs purchased an unimproved residential lot in the Springs Landing subdivision located in Seminole County, Florida for the purpose of constructing a single family home. The lot is approximately 0.7 acres and fronts the Little Wekiva River. At the time of purchase, the property contained a subdivision restriction prohibiting building on the 0.4 acres adjacent to the Little Wekiva River, since that area was part of the one hundred year flood plain.

The District is a state agency with powers under Chapter 373 Florida Statutes, to regulate activities harmful to water resources. In 1988, the Florida legislature enacted Florida Statute § 373.415, which mandated that the District Governing Board enact rules establishing riparian habitat protection zones adjacent to the waterways of the Wekiva River System, including the Little Wekiva River. Pursuant to the legislation, the District conducted a scientific study, and based upon that study, amended its regulatory permitting rules to establish the Riparian Habitat Protection Zone ("RHPZ"). Any lot in the RHPZ was required to get a management and storage of surface waters ("MSSW") permit prior to construction.

The Saboffs, whose lot was in the RHPZ, applied in March 1991 for a MSSW permit for the construction of a

home, swimming pool, and stormwater treatment system on their lot. At that time, the Saboffs' property was the only undeveloped lot in the subdivision. The RHPZ rules required that the Saboffs provide reasonable assurance that their proposed construction activity would not adversely affect the wildlife functions of aquatic and wetland species in the RHPZ and meet water quality and quantity criteria for the discharge of stormwater into the Little Wekiva River. Since the home and pool would require the destruction of 0.3 acres of RHPZ wildlife habitat, the rules required the Saboffs to provide mitigation for the loss of habitat in order to receive the necessary permits. By way of mitigation, the District proposed that the Saboffs place a deed restriction or conservation easement over the rear 0.4 acres of the lot ("Mitigation Area") prohibiting construction on that portion of the property. The Saboffs requested that they be allowed to place decking, a boardwalk, a fence, tree house, sandbox, and a swing set in the Mitigation Area. In June 1991 the Governing Board granted the MSSW permit for the construction of the home and pool, subject to the Saboffs recording a deed restriction or conservation easement, with the additional modification that the Saboffs would be allowed to clear certain types of underbrush from the Mitigation Area.

Interested third parties administratively challenged the permit, but the Saboffs were allowed, through agreement with the District, to commence, and in fact completed, construction in the non-mitigation area prior to the conclusion of the administrative proceedings. Following completion of construction, but prior to a final administrative decision, the Saboffs initiated their judicial

challenges to the revised permit's conservation easement requirement. In August of 1992, the administrative process resulted in the approval of the permit subject to the Saboffs' recording a deed restriction or conservation easement.

III. Discussion

We review *de novo* the denial of a motion for summary judgment on res judicata grounds. *See Harris v. Board of Education of Atlanta*, 105 F.3d 591 (11th Cir. 1997); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992).

As the district court did not provide any grounds for denying the District's motion for summary judgment, we are without the benefit of the reasons upon which the district court based its decision.

Although the District asserted a number of arguments in its motion for summary judgment which may have resulted in the dismissal of the action, the Court only addresses the threshold issue of res judicata as to the Saboffs' claims for relief.

This case presents an issue previously recognized in *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), a case squarely on point. While *Williamson County Regional Planning Commission v. Hamilton Bank of Johnston City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation prior to bringing suit in federal court for a takings claim, the doctrine of res

judicata in conjunction with 28 U.S.C. § 1738[1] precludes a plaintiff from pursuing in federal court a claim previously litigated in state court. *Fields*, citing *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897, 97 S.Ct. 260, 50 L.Ed.2d 180 (1976), explains that this apparent dilemma is resolved by the plaintiff " 'reserv[ing] her constitutional claims for subsequent litigation in federal court' by 'making on the state record a reservation as to the disposition of the entire case by the state courts' to preserve access to the federal forum." *Fields*, 953 F.2d at 1303 (quoting *Jennings*, 531 F.2d at 1332). *Fields* held that an additional two prerequisites must be met for a "*Jennings* reservation" to be effective. The potential federal court litigant must be precluded from filing his or her suit in the federal court in the first instance and must be in state court involuntarily. *See Fields*, 953 F.2d at 1306.

Therefore, the relevant inquiry is whether Florida's law of res judicata would ordinarily bar the Saboffs' subsequent federal claims, and if so, whether the Saboffs made an effective *Jennings* reservation. *See Fields*, 953 F.2d at 1307. " 'The Florida doctrine of res judicata bars subsequent litigation where there is (1) identity of the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the person for or against whom the

---

[1] Section 1738 requires "a federal court to give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984).

claim is made.' " *Fields*, 953 F.2d at 1307-08 (quoting *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1509 (11th Cir. 1986), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed. 912 (1986)). Florida law defines identity of causes of action as causes "sharing similarity of facts essential to both actions." *Id.* (quoting *Amey*, 758 F.2d at 1510). The facts underlying the state and federal claims at issue are indisputably identical. In *Fields*, the court held that although a minor distinction exists between the federal and state takings claims, the state claim precluded the subsequent federal claim under res judicata principles. *See id.* Once again, *Fields* is on all fours, and it is clear that Florida res judicata principles would normally preclude the subsequent federal action. Additionally, the state court's dismissal of the Saboffs' state claims constitutes an adjudication of the merits under Florida law for the purposes of res judicata. *See* Fla.R.Civ.P. 1.420(b) ("[u]nless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits"); *Aquatherm Industries, Inc. v. Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir. 1996).

As previously stated, the only way that the Saboffs might have preserved their federal claims was through a *Jennings* reservation. Both *Jennings* and *Fields* make clear that a *Jennings* reservation, as an exception to the well-settled doctrine of res judicata, must be set forth clearly, on the record, and at the outset of the state court claim, which was not done in this case. See *Fields*, 953 F.2d at 1309 n. 10; *Jennings*, 531 F.2d at 1332. The Saboffs argues that they made an "implicit" *Jennings* reservation,

through an off the record verbal understanding with the District that federal questions would be preserved. Even if the facts supported this conclusion, this off the record communication is clearly insufficient to meet the standard for a *Jennings* reservation as set forth in *Jennings* and *Fields*.

VI. Conclusion

Jennings and *Fields* dictate that the Saboffs' federal law claims are barred by Florida law of res judicata. Therefore, the district court's denial of the District's motion for summary judgment was improper and is REVERSED.

APPENDIX "B"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIFTH DISTRICT JULY TERM 1996

JAMES R. SABOFF
and KATHY R. SABOFF,

Appellants.

v. CASE NO. 95-1458

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,
et al.,

Appellees.

_____/

Opinion filed August 30, 1996

Appeal from the Circuit Court
for Seminole County,
Seymour Benson, Judge.

Michael D. Jones of Leffler & Associates,
Inc., Winter Springs, for Appellants.

Michael L. Rosen of Florida Legal
Foundation, Inc., Tallahassee,
Amicus Curiae.

Kathryn L. Mennella, Palatka, and
Robert A. Butterworth, Attorney General
and Ana Cristina Martinez, Assistant
Attorney General, Tallahassee, for Appellees.

Carole Joy Barice of Fowler, Barice & Feeney,
P.A., Orlando, and Joseph Z. Fleming, Miami,
Amicus Curiae Florida Audubon Society.

PER CURIAM.

AFFIRMED. *See Department of Community Affairs v. Moorman*, 664 So. 2d 930, 932-933 (Fla. 1995); Fla. Const. art. II, § 7; § 369.311, Fla. Stat. (1995).

SHARP, W., HARRIS and THOMPSON, JJ., concur.

APPENDIX "C"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JAMES R. SABOFF AND KATHY R. SABOFF,

Appellant,

v. CASE NO. 95-1458

ST. JOHNS RIVER WATER MANAGEMENT, etc., et al.,

Appellee.

_____/

DATE: October 23, 1996

BY ORDER OF THE COURT:

ORDERED that Appellants' MOTION FOR REHEARING, FOR REHEARING EN BANC, AND FOR CERTIFICATION, filed September 16, 1996, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Michael D. Jones, Esq.
Kathryn L. Mennella, Esq.
Edmund Baxa, Jr., Esq.
Joseph Z. Fleming, Esq.
Carole Joy Barice, Esq.
Gerald B. Curington, Esq. and
Ana Cristina Martineaz, Esq.

APPENDIX "D"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES R. and KATHY R. SABOFF,

Plaintiff,

CASE NO. 96-1223-CIV-ORL-18

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Defendant.
_____/

ORDER

(Filed July 28, 1998)

This matter came before the court for trial on May 4, 1998. during the course of the trial, the court found as a matter of law that four-tenths (4/10) of an acre of the Saboff's property had been taken for public use by defendant, the St. Johns River Water Management District. By stipulation of the parties, the issue of damages for the taking, as well as plaintiffs' equal-protection and substantive-due-process claims, were submitted to the jury. In accordance with Federal Rule of Civil Procedure 52(a), the court now issues its findings of fact and conclusions of law.

The plaintiffs owned a seven-tenths (7/10) acre lot located in Seminole County, Florida, described as:

> Lot 39, Springs Landing, Unit 2, as recorded in Plat Book 24, Page 28, of the Public Records of Seminole County, Florida.

Plaintiffs purchased the property in 1984. The property is bounded on one side by the Little Wekiva River and was but one lot in a multi-lot subdivision. When plaintiffs purchased the property, it had already been permitted for development and plaintiffs were presumably able to build on any part of the property.

In 1988, Florida enacted legislation giving the St. Johns Water Management District authority to establish certain "riparian habitat protection zones" along the Wekiva River. *See* Fla. Stat. § 373.415 (1995). In March of 1989, the District enacted a set of rules referred to as 40C-4.041, 40C-4.091, and 40C-41.063, which established a riparian habitat protection zone over approximately 550 feet on each side of the Wekiva River as it runs through portions of Orange, Lake, and Seminole County, Florida.

In December of 1990, the Saboffs decided to construct a single-family residence on their property, which at that time was the only remaining undeveloped lot in the subdivision. The Saboffs were advised that they must seek permit approval from the District Prior to beginning construction. The Governing Board of the St. Johns River Water Management District later issued the permit conditioned upon the construction of a retention berm on the rear portion of the property. The Board also advised that a conservation easement was to be placed over four-tenths ($^4/_{10}$) of an acre of the Saboffs' property.

On June 11, 1991, the Saboffs accepted the conditions imposed by the District under protest, and simultaneously commenced legal action against the District in state circuit court. The District removed the action to this

Court, after which the District raised the issues of ripeness and exhaustion of administrative remedies in seeking dismissal. In response, the Saboffs amended their complaint, deleting all federal claims causing the matter to be remanded to state court for further administrative and judicial proceedings. On August 7, 1992, after a state administrative proceeding, the District entered a final order imposing the deed restrictions and other conditions upon the Saboffs' property.

After a series of state court proceedings, the Saboffs' state-law claims were dismissed, with the dismissal later being affirmed by Florida's Fifth District Court of Appeal. *Saboff v. St. Johns River Water Mgt. Dist.*, 681 So. 2d 757 (Fla. Dist. Ct. App. 1996); *St. Johns River Water Mgt. Dist.*, 635 So. 2d 32 (Fla. Dist. Ct. App. 1994). The Saboffs then filed the instant case pursuant to 42 U.S.C. § 1983. The court determined that the action was ripe as a result of the Saboffs' exhaustion of all administrative and state court remedies. The court further determined that the action was timely. *E.g., Tari v. Collier County*, 56 F.3d 1533, 1537 n.12 (11th Cir. 1995); *accord Alachua County v. Cheshire*, 603 So. 2d 1334, 1337 (Fla. Dist. Ct. App. 1992);

In light of the credible evidence adduced at trial, the court concludes that the Land and Water Adjudicatory Commission's 1988 Order as a Finding of Fact identifies the District as a "Special Taxing District," the District stipulated that it did not have Eleventh Amendment immunity, the stipulation was established in a state court order in July of 1995. Arguably, after 1996, the Legislature created Eleventh Amendment for the District. Prior to the 1996 legislation, however, the Districts were autonomous, special taxing districts similar to a school board, County,

or municipality and, therefore, were not entitled to Eleventh Amendment immunity. *Tuveson v. Florida Governor's Counsel on Indian Affairs*, 373 F.2d 730, 732 (11th Cir. 1984).

By imposing restrictions limiting the Saboffs' ability to disturb the underbrush on their property or otherwise utilize the property as desired, the District has taken more than one half of the Saboffs' property. The trial testimony also established that the Saboffs were treated differently from similarly situated land owners within the subdivision. The conservation easement imposed effectively frustrates a portion of the Saboffs' reasonable investment-backed expectations and burdens the property in a way not bargained for by plaintiffs. On the facts established, the Court finds that the District's imposition of the easement has taken four-tenths ($^4/_{10}$) of an acre of the Saboffs' property.

Florida Statute section 704.061 defines a conservation easement as a right or interest in real property, and limits the Saboffs right to exclude others from their property, which interferes with the full incidents of ownership. In 1987, the United States Supreme Court found that implementing regulatory conditions that effectuate acquisition of title or the interference with possessory rights may warrant a finding that private property has been taken for public use. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987). In the case at bar, the District granted the Saboffs' permit only after imposing the condition that they grant an easement by deed to the District for public use and benefit. "When a real property record title is encumbered with an easement or restrictive covenant, which is dedicated to the general public's use, but for which the private owner was never compensated, a

title taking must be found." Note, *Takings: Who Says it Needs to Be So Confusing?*, 22 Stetson L. Rev. 379, 385 (1993). The practical effect is that the District controls a significant portion of the use of the Saboffs' property.

The court is not persuaded by the District's argument that because the plaintiffs were able to build upon three-tenths (3/10) of their property, there has been no taking. Rather, the court is persuaded by a line of cases which suggests the opposite. In 1992, the United States Supreme Court considered the "unit of property" or "parcel as a whole" analysis concluding that it would be inappropriate to suggest that the taking of less than 100 percent of the property would not result in a compensable taking. *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886 (1992). Circuit courts have followed *Lucas,* finding that a partial taking may be found even if a viable, economical use remains in the property. *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal,* 135 F.3d 275, 285-86 (4th Cir. 1998); *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1178-79 (Fed. Cir. 1994); *Reahard v. Lee County,* 968 F.2d 1131, 1134-35 (11th Cir. 1992), *cert. denied,* 514 U.S. 1064 (1995).

The court found that the Saboffs were intentionally treated different from others similarly situated in their subdivision and the riparian habitat protection zone, which affected the use and benefits of a fundamental property interest. The jury concluded that the Saboffs had established a violation of their equal protection rights under the Fourteenth Amendment, but did not award damages.

The court further determined that there was a question as to whether or not the District was reasonable in its accommodation to protect the water and the wildlife. On this issue, the court is guided by the decision in *DeBlasio v. Zoning Bd. of Adjustment of West Amwell*, 53 F.3d 592, 598 (3d Cir. 1995), in which the court held that property ownership, *per se*, is entitled to substantive due process protection under the Fourteenth Amendment. The issue of whether the District's rules were arbitrary, capricious, or failed to bear a substantial relationship to the objective sought was submitted to the jury. The jury found that the Saboffs' substantive due process rights had been violated and awarded the sum of fourteen thousand ($14,000.00) dollars. The parties stipulated to waive a twelve-member jury and accept the findings of a seven-member jury as to the value of the property on June 10, 1991, the date the court established as the date of the taking.

In accordance with the court's findings of fact and conclusions of law, as well as the verdict returned by the jury, the court finds that the District took, by way of inverse condemnation, four-tenths ($^4/_{10}$) of an acre of the Saboffs' property for which the Saboffs are to be awarded $100,100.00, together with the applicable interest at the applicable rate and costs; and that for violation of the Saboffs' substantive due process rights, the jury awarded the amount of $14,000.00; and while the jury has found the actions of the District have violated the Saboffs' equal protection rights under the law, no damages were awarded for that violation. The court retains jurisdiction to assess attorney fees and costs as applicable.

Accordingly, it is therefore **ORDERED** and **ADJUDGED** as follows:

The District shall pay as full compensation the principal sum of ONE HUNDRED THOUSAND ONE HUNDRED ($100,100.00) DOLLARS for the real property taken, together with simple interest calculated at the Florida legal rate of interest of 12 percent from June 10, 1991 to December 31, 1994, and 8 percent from January 1, 1995 to December 31, 1995, and 10 percent from January 1, 1996 to May 6, 1998, and thereafter at the legal rate of interest until the total principal sum has been paid.

As such, the Saboffs shall recover a total of ONE HUNDRED THOUSAND ONE HUNDRED ($100,100.00) DOLLARS in full payment for their interest in the property taken, together with interest on said amount in the total amount of SEVENTY FOUR THOUSAND TWO HUNDRED THIRTY THREE THOUSAND AND 07/100 ($74,233.07), together with the sum of FOURTEEN THOUSAND ($14,000.00) DOLLARS awarded for substantive due process violation for total damages of ONE HUNDRED EIGHTY EIGHT THOUSAND THREE HUNDRED THIRTY THREE AND 07/100 ($188,333.07).

Further, James R. Saboff and Kathy R. Saboff shall deliver to the St. Johns River Water Management District, a Warranty Deed Passing fee simple interest to four-tenths ($^4/_{10}$) of an acre of the Saboff property taken subject to a correct meets and bounds survey.

The court hereby enters final judgment in favor of the Saboffs in the amount of $188,333.07 as of May 6, 1998, together with interest at the legal rate until satisfied. The St. Johns River Water Management District shall deposit said amount in the registry of the court within thirty (30) days from the date of this order, and upon

payment of the money specified into the registry of the court, the unencumbered right, title, and interest in and to the described property shall vest fee simple in the St. Johns River Water Management District. Any delay encountered in obtaining the legal description to effectuate the transfer of the property interest will not result in the accrual of interest. The court retains jurisdiction to award applicable fees and costs.

It is **SO ORDERED** in Orlando, Florida, this 28 day of July 1998.

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States
District Judge

Copies to all counsel of record

APPENDIX "E"

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRIENDS OF THE WEKIVA and FLORIDA AUDUBON SOCIETY,	)	
Petitioners,	)	DOAH CASE NO. 91-6823
vs.	)	SJRWMD APPLICATION NO. 4-117-0298A
JIM SABOFF and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,	)	
Respondents.	)	

PARTIAL SETTLEMENT AGREEMENT

COME NOW the parties, by and through their undersigned counsel, and stipulate to the following partial settlement of the above styled cause:

1. This action concerns the validity of a permit for construction of a home by Respondent Saboff ("Saboff") on Lot 39 of Springs Landing, Unit II (hereinafter referred to as "Saboff's property"), within the Riperian Habitat Protection Zone of the Little Wekiva River in Seminole County, Florida.

2. Saboff's property consists of two distinct areas: (a) the building pad, most of which was cleared of natural vegetation prior to August 1, 1991, on which a single family residence (house, mulched driveway, pool and sidewalk) are to be constructed; and (b) the remainder of the lot, which is undisturbed, and which is to be encumbered by a conservation easement pursuant to the permit.

A proposed berm for stormwater treatment was also approved to be located on a portion of the remainder of the lot which is undisturbed.

3. The parties agree that the only matter at issue in this administrative proceeding is the modification to permit condition No. 17 approved by St. Johns River Water Management District ("District"), on June 11, 1991, (permit no. 4-117-0298). The parties stipulate that the permit conditions no. 1 - 16 and 18 approved by the District and the appropriateness of the design and location of the proposed house and other parts of the proposed water management system, as limited by permit conditions no. 1 - 16 and 18, are not at issue in this administrative proceeding. The relevant permit conditions which were approved by the District Governing Board are attached as Exhibit "A" and incorporated herein. Inasmuch as the focus of the amended petition is the sufficiency of the modification to permit condition No. 17 (as opposed to the construction of the residence), and Saboff is desirous of beginning construction of his residence, the parties agree that Saboff may proceed to construct the single family residence (house, mulched driveway, pool and sidewalk) pursuant to the terms of the District order attached hereto as Exhibit "B" and incorporated herein.

4. This stipulation does not agree to any construction, including additional clearing, removal of underbrush, or cutting of vegetation, at any location on the lot outside the previously cleared area, with the exception as set forth in Exhibit "B".

5. Prior to undertaking any construction activities, Saboff will delineate the construction area described in

paragraph 8 of Exhibit "B" by means of flagging or fencing, and shall deliver written notification of such delineation to each party so that each party will have at least three working days to inspect the flagged or fenced delineation prior to the beginning of construction. Notification shall be delivered to the parties' addresses as indicated in this Stipulation.

6. Saboff agrees that he will dismiss, with prejudice, Count VI of the Complaint which Saboff filed in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, bearing Case No. 91-2970-CA16-L, now pending as *Saboff and Saboff v. St. Johns River Water Management District, Patrick Frost, Florida Audubon Society, Charles Lee, Friends of the Wekiva and Nancy Prine,* in the United States District for the Middle District of Florida, Orlando Division as Case No. 91-907-CIV-ORL-18.

7. This Partial Settlement Agreement is not and shall not be interpreted in any way to be a consent to or a waiver of defenses to any matters complained of in any proceeding by Saboff. Furthermore, by this agreement Saboff does not concede to DOAH's jurisdiction over this matter.

8. This Partial Settlement Agreement concerns disputed claims and defenses. By stipulating to this agreement, none of the parties admits any facts or conclusions of law, except as otherwise stipulated herein.

/s/ R. Duke Woodson
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/s/ Michael D. Jones
Michael D. Jones, Esquire
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Florida Bar No. 137608
P. O. Box 3567
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407/366-8806

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U. S. Mail this 9th day of January, 1992 to: Michael D. Jones, Esquire, P. O. Box 3567, Winter Springs, FL

R. Duke Woodson, Esquire, 111 North Orange Ave., Suite 1800, 32708; Kathryn ~~L. Mennella, St. Johns River Water Management District, P. O. Box 1429, Palatka, FL 32172;~~ Charles Lee, Senior Vice President, Florida

Audubon Society, 460 Highway 436, Suite 200, Casselberry, FL 32707.

/s/ Kathryn L. Mennella
~~R. Duke Woodson~~
KATHRYN L. MENNELLA

APPENDIX "F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3337

JAMES R. SABOFF,
KATHY R. SABOFF,

Plaintiffs-Appellees,

versus

ST JOHN'S RIVER WATER
MANAGEMENT DISTRICT,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir. 19___, ___ F.2d ___).

(Filed Mar. 20, 2000)

Before: DUBINA, Circuit Judge, KRAVITCH, Senior Circuit Judge, and NESBITT*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service

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* Honorable Lenore C. Nesbitt, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT
JUDGE

ORD-42
(6/95)